Supreme Court, U.S.
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No. 93-1525

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MICHAEL A. LEBRON,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Amtrak—which has been found by this Court to be a "private, for-profit corporation," * and which has been held to be a private actor in *every* case that has addressed the issue—should be treated as a governmental actor, subject to the requirements of the First Amendment, when it engages in the commercial activity of offering advertising space in its railroad stations.

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* *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 454 (1985).

RULE 29.1 LISTING

The National Railroad Passenger Corporation has no parent companies or subsidiaries.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, Michael A. Lebron, commenced this suit against Amtrak, the owner of Pennsylvania Sation in New York, based on Amtrak's refusal to make available a huge, 103-foot long illuminated billboard called "the Spectacular" for the display of an advertisement attacking the political activities of the Coors family, owners of the Coors Brewing Co. Petitioner alleged that Amtrak's refusal to sell him space for the ad was governmental action subject to the requirements of the First Amendment, and that the First Amendment compelled Amtrak to display his political attack ad.

Relying on the "unvarying line of authority" that has held that Amtrak is not a governmental actor for con-

stitutional purposes, the court of appeals correctly held that Amtrak's refusal to run petitioner's advertisement was not equivalent to an act taken by the federal government, and accordingly ordered that petitioner's complaint be dismissed. App. 12a.[1]

A. Background

1. *Amtrak*

In the Rail Passenger Service Act of 1970 (the "Act"), Congress created Amtrak as a private, for-profit corporation, subject to the District of Columbia Business Corporation Act. *See* 45 U.S.C. § 501 *et seq* (1988). The Act explicitly states that Amtrak is "not an agency, instrumentality, authority, or entity, or establishment of the United States Government." *Id.* § 541.

Amtrak's common shares of capital stock are held by four other private railroads: The Grand Trunk Western Railroad Company, Burlington Northern, Inc., Soo Line Railroad Company, and The Penn Central Corporation (which is no longer in business as a railroad). C.A.App. 1173. Preferred shares of Amtrak's stock are held by the United States. *Id.*

The Act provides that Amtrak

> shall be operated and managed as a for profit corporation, the purpose of which shall be to provide intercity and commuter rail passenger service, employing innovative operating and marketing concepts so as to fully develop the potential of modern rail service in meeting the Nation's intercity and commuter passenger transportation requirements.

45 U.S.C. § 541. Like any other for-profit corporation, Amtrak files federal corporate income tax returns with

[1] Citations to App. —— are to the pages of the appendix to the Petition. Citations to C.A.App. ——, E ——, and SE —— are to pages of the following documents in the court of appeals: the joint appendix, the exhibit volumes, and the supplemental exhibit volume.

the United States government. C.A.App. 1173. Amtrak's employees are not on a federal pay scale, and their retirement monies are paid into the Railroad Retirement Fund, as are the monies of all railroad employees. C.A. App. 1174.

Amtrak receives financial subsidies from the federal government, 45 U.S.C. § 601, but those subsidies cover only a fraction of Amtrak's operating expenses and have decreased in recent years. The record showed that Amtrak's grant request to Congress for 1993 anticipated a subsidy reduction from 21 percent to 16-18 percent of its operating expenses, E 2258, and Amtrak strives to reduce subsidies even further, E 2224-2227.

Amtrak's nine-person board of directors is substantially made up of private individuals closely associated with the railroad industry: two board members who are selected by the President from a list submitted by commuter authorities; three additional board members who are selected by the President, each of whom is required by law to be connected to the railroad industry,[2] and no more than two of whom may be registered as members of the same party; two board members who are selected by the preferred stockholder; the Secretary of Transportation; and the President of the Corporation, who is selected by the other board members. 45 U.S.C. § 543.

Amtrak, not the federal government, owns New York City's Penn Station. C.A.App. 1175. In 1976, the station was deeded from the Pennsylvania Tunnel and Terminal Railroad Company, a subsidiary of Penn Central, to Conrail, a private corporation, which then conveyed the property to Amtrak. C.A.App. 1174. The federal

[2] One of these members is selected from a list recommended by the Railway Labor Executives Association, one from among governors of states with an interest in rail transportation, and one "as a representative of business with an interest in rail transportation." 45 U.S.C. § 543(a)(1)(C)(iii).

government holds a mortgage that covers Penn Station. C.A.App. 439.

2. *The Spectacular*

On the west side of the upper level of Penn Station, dominating the main entrance to Amtrak's waiting room and ticket area, is a curved, 103-foot long by 10-foot high illuminated billboard known as "the Spectacular." App. 3a. Amtrak has authorized Transportation Displays, Incorporated ("TDI") to sell advertising space on the Spectacular and at other locations. The contract between Amtrak and TDI expressly provides that "[a]ll advertising material, exhibit material, notices and advertisements and their manner of presentation and design, shall be subject to approval by Amtrak." E 5. Advertising on the Spectacular is overseen by Amtrak's Real Estate and Operations Development Department, which is responsible for all corporate profit-making ventures other than running the railroad. The Vice President for that Department, Anthony DeAngelo, applies Amtrak's advertising policies and makes the final decision whether to approve ads for the Spectacular. C.A.App. 106-08. Anthony DeAngelo is not a public official.

Amtrak has had a long-standing policy prohibiting *all* political advertising on the Spectacular. C.A.App. 107, 365-66, 813-15, 823-24, 844. The policy, in fact, has been in effect since the Spectacular was built in 1967, before Amtrak even existed. C.A.App. 365-66, 813-15; E 192. As Chief Judge Newman, the only member of the panel to address the First Amendment issue, found in his dissent, "Amtrak's billboard space in Pennsylvania Station . . . has not become a forum for ads of such pointed political content as Lebron's attack on the makers of Coors beer for promoting 'The Far Right's political agenda.'" App. 16a.[3]

[3] Petitioner's assertion that Amtrak has "display[ed] other political advertisements in Penn Station," Petition ("Pet.") 2, is completely false. The record shows that Amtrak has always prohibited the display of political ads on the Spectacular and everywhere else in Penn Station. Amtrak has permitted public service ads in Penn Station, but not on the Spectacular.

3. *Amtrak's Rejection of Petitioner's "Advertorial"*

Petitioner's proposed "advertorial," as he calls it, is a photomontage of convivial Coors drinkers, juxtaposed with a scene in which Nicaraguan villagers are menaced by a Coors beer can hurtling toward them like a missile. In addition to its powerful visual image, the "advertorial" contains considerable text, superimposed on an American flag, which is sharply critical of the Coors family's support of "The Far Right's political agenda." App. 5a.[4]

On December 2, 1992, petitioner submitted a color photocopy of his ad to TDI, which TDI forwarded to Amtrak for approval. App. 4a. On December 17, Amtrak's Vice President, Anthony DeAngelo, first learned of petitioner's proposed ad. He immediately rejected it as political. C.A.App. 107-08; *see also* C.A.App. 114, 857-58, 860. In a letter dated December 23, 1992, Amtrak notified TDI of its rejection, invoking its longstanding "policy that it will not allow political advertising on the [S]pectacular advertising sign." App. 5a.

Contrary to petitioner's oft-repeated assertion, *e.g.*, Pet. 6, 16, 22, 24, the record shows that Amtrak's board of directors did not participate in the decision to reject petitioner's advertorial. C.A.App. 355-56, 365, 373-74. Indeed, there is nothing to suggest that the board even knew about the decision or the policy that prompted it. The district court made no such finding, nor could it have done so. The record shows that the *only* relationship between Amtrak's board and any aspect of Amtrak's advertising policies and practices is that the board authorized Anthony DeAngelo to enter into nationwide contracts with TDI to lease ad space, and that several years

[4] The text to petitioner's "advertorial" is reproduced in the Appendix to Brief in Opposition.

earlier the board approved a single long-term lease with A&S department store for the Spectacular. App. 7b; E 400-02.

B. The Decisions Below

Petitioner commenced this action on December 30, 1992, seeking an injunction requiring Amtrak to display his ad. A trial was conducted entirely on documentary submissions—including deposition transcripts, exhibits, stipulations, and admissions derived from each party's "mark-up" of proposed findings of fact submitted by the opposition. C.A.App. 1015-171.

On February 5, 1993, the district court issued an opinion and order directing Amtrak to give petitioner immediate access to the Spectacular. Departing from an unbroken line of precedent from five circuits, the court held that Amtrak is a governmental actor for constitutional purposes. Then, ignoring a decision of this Court that expressly upheld a municipal government's policy of prohibiting political advertising on government property, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), the district court ruled that Amtrak's rejection of petitioner's ad violated the First Amendment. App. 4b-21b. A three-judge panel of the court of appeals granted Amtrak a stay pending appeal and ordered the appeal to proceed on an expedited basis. App. 6a.

On December 27, 1993, in an opinion written by Judge Mahoney and joined by Judge Lumbard, the court of appeals reversed, holding that Amtrak was not a governmental actor for constitutional purposes. App. 12a. The court began its analysis by noting that Amtrak is "a private, for-profit corporation under the District of Columbia Business Corporation Act," App. 7a, and that Congress has specified that "Amtrak is 'not . . . an agency, instrumentality, authority, or entity, or establishment of the United States Government,'" *id.* (quoting 45 U.S.C. § 541). The court of appeals noted that the issue

whether Amtrak is a governmental actor was governed by the framework for "discerning the presence of government action in the activities of private entities" set forth by this Court's decisions in *Blum v. Yaretsky*, 457 U.S. 991 (1982), *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978), *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). App. 7a-8a.[5]

The court of appeals then looked to the "numerous cases" that, applying this Court's precedents to Amtrak or Conrail, have held that neither is "subject to constitutional constraints upon government action." App. 11a-12a (collecting cases). One such case was the Second Circuit's decision in *Myron v. Consolidated Rail Corp.*, 752 F.2d 50 (2d Cir. 1985), in which the court found that

> despite federal funding, regulation, stock ownership and representation on the board of directors, there is nothing resembling federal supervision of day-to-day activities. In sum, we conclude that despite an obviously close relationship, the federal government has not "so far insinuated itself into a position of interdependence" with Conrail that the latter's personnel decisions can be considered federal action.

Id. at 55-56 (quoting *Burton*, 365 U.S. at 725). The court of appeals held that "[i]n view of this unvarying

[5] Petitioner erroneously contends that the court "pointedly ignored" this Court's *Burton* decision. Pet. 19. The court of appeals explicitly applied *Burton* and this Court's subsequent cases interpreting that decision. Indeed, the court cited *Burton* more times than any other Supreme Court decision. *See* App. 7a-9a. The court of appeals in a footnote did state that "[s]ome commentators have suggested that more recent Supreme Court cases, and especially the Court's ruling . . . in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 542-47 (1987), have curtailed *Burton*'s precedential authority," App. 8a n.1—a fact that petitioner would like to ignore, but that this Court also has acknowledged, *see, e.g., Jackson*, 419 U.S. at 358 ("actual holding" of *Burton* "limit[ed] . . . to lessees of public property"); *see* pp. 17-20, *infra*.

line of authority, and the fact that our pertinent precedent [*Myron*] addressed an issue of First Amendment retaliation . . . we conclude that Amtrak's refusal to run [petitioner's] advertisement on the Spectacular was not governmental action . . . ." App. 12a.

The panel majority did not reach the issue whether Amtrak's advertising policy would have withstood First Amendment scrutiny if Amtrak were considered a governmental actor. Chief Judge Newman in dissent, however, stated that although he believed Amtrak to be a governmental actor, he "would not uphold the District Court's injunction requiring Amtrak to display Lebron's ad." App. 15a-16a. Noting that "Amtrak's billboard space in Pennsylvania Station . . . has not become a forum for ads of such pointed political content as Lebron's attack on the makers of Coors beer for promoting 'The Far Right's political agenda,' " Judge Newman concluded that "it is not an appropriate use of a federal court's equity power to force Amtrak to venture so extensively into the political arena." App. 16a. If Amtrak's policies were shown to be unconstitutionally vague, Judge Newman noted, "damage remedies and declaratory relief [would] have to suffice." *Id.*

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' DECISION ACCORDS WITH THE DECISION OF EVERY COURT THAT HAS ADDRESSED THE ISSUE WHETHER AMTRAK IS A GOVERNMENTAL ACTOR

In an effort to argue that this case warrants the Court's attention, petitioner struggles to create the appearance that the court of appeals' holding conflicts with decisions from other circuits. In fact, there is no conflict. *Every single court that has addressed the question whether Amtrak or Conrail is a federal actor for constitutional purposes has concluded that they are not. See Andrews v. Consolidated Rail Corp.*, 831 F.2d 678, 681-83 (7th Cir. 1987) (Conrail not a governmental actor); *G & T Terminal Packaging Co. v. Consolidated Rail Corp.*, 830 F.2d 1230, 1236 (3d Cir. 1987) ("Every court that has considered the matter has concluded that Conrail is not a governmental actor for purposes of constitutional analysis."), *cert. denied*, 485 U.S. 988 (1988); *Morin v. Consolidated Rail Corp.*, 810 F.2d 720, 722-23 (7th Cir. 1987) (Conrail not a governmental actor); *Anderson v. National Railroad Passenger Corp.*, 754 F.2d 202, 204 (7th Cir. 1984) ("The ties between Amtrak and the federal government do not warrant a finding of governmental action for purposes of the fifth amendment."); *Myron v. Consolidated Rail Corp.*, 752 F.2d 50 (2d Cir. 1985) (Conrail not a governmental actor); *Wilson v. National Railroad Passenger Corp.*, 824 F. Supp. 55, 57-58 (D. Md. 1992) (Amtrak not a governmental actor); *Railway Labor Executives Assn. v. National Railroad Passenger Corp.*, 691 F. Supp. 1516, 1524 n.11 (D.D.C. 1988) ("[Plaintiffs] claim Amtrak is a governmental enterprise because it was created by Congress and relies heavily on federal funds. This argument has been uniformly rejected by federal courts and this Court concurs in their analysis."); *Marcucci v. National Railroad Passenger Corp.*, 589 F. Supp. 725, 727-29 (N.D. Ill. 1984) (Amtrak not a governmental actor); *Kimbrough v. National Railroad*

Passenger Corp., 549 F. Supp. 169, 172-73 (M.D. Ala. 1982) (Amtrak not a governmental actor); *Moorhead v. National Railroad Passenger Corp.*, No. 81-1579, slip op. at 3-4 (D.D.C. Mar. 9, 1982) (Amtrak not a governmental actor); *see also Ehm v. National Railroad Passenger Corp.*, 732 F.2d 1250 (5th Cir.), *cert. denied*, 469 U.S. 982 (1984) (Amtrak not subject to Privacy Act).[6]

Thus, this case does not present a conflict among the circuits. There is unanimity among the courts on the only matter decided by the court of appeals: Amtrak is not a federal actor for purposes of constitutional analysis.

Unable to show that the holding of the court of appeals conflicts with the holding in any other case, petitioner argues that the reasoning employed by the court of appeals in this case, as well as the reasoning employed by all the other courts that reached the same result, is somehow inconsistent with the reasoning employed by other

[6] Petitioner contends that the cases holding that Conrail is not a governmental actor are distinguishable from the present case because Conrail and Amtrak are "very different entit[ies]." Pet. 24. For example, petitioner asserts that "Conrail's only government 'support' was in the form of government loans and investments" and that it "never received direct government subsidies." Pet. 24. Petitioner is just plain wrong. The government purchased billions of dollars of property on behalf of Conrail. Indeed, the $2.113 billion worth of property acquired by the government to which petitioner refers, Pet. 4-5, consists of 19,000 miles of rail lines and related propertly (including Penn Station) *that the government purchased for Conrail, not Amtrak. See* SE 2411-12. Conrail then conveyed a small portion of these properties (the Northeast Corridor line) to Amtrak. SE 2411. And in consideration for the appropriations it receives, Amtrak, like Conrail, issues preferred stock and notes to the federal government. *See* 45 U.S.C. § 544(c); *id.* § 854(e). Even the district court in this case acknowledged that Conrail and Amtrak are "similarly structured" for purposes of governmental action analysis, *see* App. 10b, as has every other court that has addressed this issue, *see, e.g., Andrews v. Consolidated Rail Corp.*, 831 F.2d 678, 683 (7th Cir. 1987); *Morin v. Consolidated Rail Corp.*, 810 F.2d 720, 722-23 (7th Cir. 1987).

courts of appeals in cases presenting different sets of facts. Petitioner's arguments, however, are premised upon misstatements of the court of appeals' reasoning and of the other courts' decisions.

Petitioner first contends that contrary to four other circuit courts, the court of appeals required petitioner to satisfy a more rigorous standard for finding governmental action because petitioner asserted a First Amendment claim rather than a claim of racial discrimination. Pet. 13-16. The court of appeals did no such thing.

The court of appeals based its holding that Amtrak was a private actor on (i) this Court's decisions in *Blum*, *Jackson*, and *Burton*, (ii) the Second Circuit's decision in *Myron*, and (iii) the "unvarying line of authority" from other circuits. *See* App. 7a-12a. Of these cases, *Burton* involved a claim of racial discrimination, *Blum* and *Jackson* involved Due Process claims, and Myron involved a First Amendment claim. There is no indication that the court of appeals treated any of these precedents differently because they involved different constitutional claims. Indeed, the *Myron* decision, which the court of appeals found to "provide strong guidance, if not controlling authority, for our decision in this First Amendment case," App. 10a, explicitly relied upon this Court's decision in *Burton*, a racial discrimination case, *see Myron*, 752 F.2d at 55-56. Thus, petitioner's suggestion that the court of appeals found Amtrak not to be a governmental actor because petitioner asserted a First Amendment claim, rather than a claim of racial discrimination, is entirely without merit.[7]

[7] The district court erroneously stated, without citation, that during oral argument Amtrak "conceded . . . that . . . it would be deemed a governmental actor" if it restricted service on the basis of race, religion, or national origin. App. 11b. In fact, when asked whether it would be a state actor if petitioner "[w]as denied services based on race or denied access to the billboard based on race," Amtrak's counsel responded: "No. I don't think under either situation . . . ." C.A.App. 1108. Asked a second time if

Petitioner next attempts to create the appearance of a circuit conflict by arguing that in cases involving entities other than Amtrak or Conrail, several courts of appeals have found the presence of federal appointees on the defendant's board of directors alone sufficient to "render[] an otherwise private entity a state actor." Pet. 16. Petitioner mischaracterizes the law of the other circuits.

Petitioner cites three Sixth Circuit decisions—the most recent of which is more than 20 years old—as evidence of a claimed "conflict." Pet. 17 & n.8 (citing *O'Neill v. Grayson County War Memorial Hosp.*, 472 F.2d 1140, 1143 (6th Cir. 1973); *Chiaffitelli v. Dettmer Hosp. Inc.*, 437 F.2d 429, 430 (6th Cir. 1971); *Meredith v. Allen County War Memorial Hosp. Commn.*, 397 F.2d 33, 35 (6th Cir. 1968)). What petitioner fails to acknowledge is that *the Sixth Circuit has expressly repudiated the reasoning of these cases in light of this Court's more recent government action decisions.* Thus, the Sixth Circuit in *Crowder v. Conlan*, 740 F.2d 447 (6th Cir. 1984), noting that members of the defendant's board of directors were public officials, held that

> [a]lthough it is true that this court has found "state action" in similar circumstances, *see O'Neill v. Grayson County War Memorial Hosp.*, 472 F.2d 1140, 1143 (6th Cir. 1973); *Chiaffitelli v. Dettmer Hospital Inc.*, 437 F.2d 429, 430 (6th Cir. 1971) (per curiam); *Meredith v. Allen County War Memorial Hosp. Comm'n*, 397 F.2d 33, 35 (6th Cir. 1968), *we believe the legal reasoning of these cases is no longer valid in light of the Supreme Court's recent holdings in this area of law.* Rather than looking to the number of public officials who serve on the governing board of a private institution, we believe the proper focus concerns whether the State has exercised "coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."

740 F.2d at 451 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). Similarly, in *Adams v. Vandemark*, 855 F.2d 312, 317 (6th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989), the Sixth Circuit—citing the Seventh Circuit's holding in *Anderson v. National Railroad Passenger Corp., supra*, that Amtrak is not a governmental actor—found the defendant not to be a governmental actor despite public representation on its board of directors.

Petitioner also cites *Foster v. Ripley*, 645 F.2d 1142 (D.C. Cir. 1981), as evidence of an alleged circuit split on the relevancy of federal appointees on an entity's board. Pet. 17. But *Foster* did not involve facts at all similar to those present here. First, in that case, a majority of the members of the defendant's board were public officials. *See* 645 F.2d at 1147. By contrast, only one of Amtrak's nine board members is a public official. *See* 45 U.S.C. § 543. Second, the public officials in *Foster* specifically approved the challenged action, *see* 645 F.2d at 1147, whereas here there is no evidence that Amtrak's board played any role in creating or implementing Amtrak's advertising policies—let alone in rejecting petitioner's ad. Finally, the court of appeals in *Foster* cited numerous other indicia of governmental action apart from the composition of the defendant's board, none of which is applicable to Amtrak:

> Over 90 percent of [Smithsonian Science Information Exchange's] budget originates from federal appropriations or contracts, the SSIE is treated by the Smithsonian [a government agency] and held out to the public as one of its bureaus, and the Smithsonian handles its accounting, personnel, payroll, audit, legal, fiscal, and procurement services and its requests to the Congress for appropriations. Indeed, the SSIE is close in character to a federal agency or depart-

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it would not be state action to deny access to the Spectacular "to black people," Amtrak's counsel responded again: "That would not be state action . . . [i]t would not be a state actor." *Id.*

ment; it is essentially an operating branch of the federal government.

Id.[8]

Foster certainly has not been regarded as compelling a conclusion that Amtrak is a governmental actor. Judge Lumbard, who wrote the *Foster* opinion, joined the decision below holding that Amtrak is not a governmental actor. And since the D.C. Circuit decided *Foster*, two district courts in that circuit have held that Amtrak is not a federal actor for constitutional purposes. *See Railway Labor Executives Assn. v. National Railroad Passenger Corp.*, 691 F. Supp. 1516, 1524 n.11 (D.D.C. 1988); *Moorhead v. National Railroad Passenger Corp.*, No. 81-1579, slip op. at 3-4 (D.D.C. Mar. 9, 1982).[9]

Finally, petitioner cites a number of decisions from other circuits that he claims "found government control of an entity's Board to be virtually sufficient in itself to establish state action." Pet. 17. That is a gross distortion of the holdings in these cases. In *Milo v. Cushing Municipal Hospital*, 861 F.2d 1194 (10th Cir. 1988), the court found the defendant to be a "public institution," *id.* at 1197, and explicitly stated that it was not deciding "whether the activity of a nominally private entity constituted state action," *id.* at 1195. There is no question that Amtrak is not a "public institution." *See, e.g., National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 454 (1985). In *Gilmore v. Salt Lake Community Action Program*, 710 F.2d 632, 637 n.12 (10th Cir. 1983), the court emphatically stated that "we do not find the presence of public officials on the board sufficient to support a finding of state action" and went on to hold that the challenged decision was not state action. And in *Downs v. Sawtelle*, 575 F.2d 1 (1st Cir.), *cert. denied*, 439 U.S. 910 (1978), the court cited the presence of public officials on the defendant's board as only one of many factors supporting its finding of state action. With respect to the significance of the defendant's board members, the *Downs* court relied upon *Jackson v. Statler Foundation*, 496 F.2d 623 (2d Cir. 1974), and the three Sixth Circuit cases cited by petitioner. As already noted, the Sixth Circuit cases petitioner cites are no longer regarded as good law by that court. And the Second Circuit obviously did not regard its prior decision in *Jackson* as requiring a finding that Amtrak is a governmental actor.

In sum, the holding of the court of appeals, as well as the court's reasoning, comports with the decisions of the other circuits.

II. THE COURT OF APPEALS' DECISION ACCORDS WITH THE DECISIONS OF THIS COURT

Petitioner also suggests that the decision of the court of appeals—as well as the decision of every other court that has addressed the issue of Amtrak's status—conflicts with this Court's precedents. Once again, petitioner's "conflict" is cut out of whole cloth.

In *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co., supra*, this Court characterized Amtrak as a "private, for-profit corporation," and held that its actions are not equivalent to those of the federal government. 470 U.S. at 454, 470-71. In that case, Amtrak had entered into certain "Basic Agree-

[8] The facts of *McVarish v. Mid-Nebraska Community Mental Health Center*, 696 F.2d 69 (8th Cir. 1982), which petitioner also cites, are equally dissimilar to those of the present case. In *McVarish*, the court found that the defendant "acted as an arm of twelve counties." *Id.* at 71. Moreover, the defendant's board, which was comprised of public officials or their designees, actually made the decision the plaintiff challenged. *Id.*

[9] It is worth noting that like each of the cases petitioner cites from the Sixth Circuit, the *Foster* decision predates this Court's more recent state action decisions in *Blum v. Yaretsky, supra*, *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), and *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987).

ments" with other private railroads, pursuant to which Amtrak relieved the railroads of their common carrier obligations. The railroads subsequently argued that the Basic Agreements constituted contractual obligations of the United States. This Court disagreed, finding that the agreements "are contracts not between the railroads and the United States but simply between the railroads and the non-governmental corporation, Amtrak." *Id.* at 470.

Petitioner's contention that this Court's precedents somehow transform this "private, for-profit corporation" into a federal actor is without merit. In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987), this Court summarized the basic test for determining whether governmental action exists in cases such as this:

> Most fundamentally, this Court has held that a government "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." 483 U.S. at 546 (quoting *Blum*, 457 U.S. at 1004).

Neither Amtrak's prohibition against political advertising in general nor its application of that prohibition to petitioner's "advertorial" satisfies this test. No federal regulation compelled or influenced these decisions. Indeed, there are no federal regulations that even apply to Amtrak's advertising. Moreover, no federal official "exercised coercive power" or provided "significant encouragement" in the formulation of Amtrak's advertising policy or Amtrak's rejection of petitioner's ad. The policy petitioner challenges originated with Amtrak's predecessor, the Pennsylvania Railroad Company, before Amtrak was even created. E 192. The policy has been applied by Amtrak's Real Estate Department, whose Vice President, Anthony DeAngelo, made the decision to reject petitioner's ad. The federal government simply played no role whatsoever in these decisions.[10]

Petitioner argues that this Court's decision in *Burton v. Wilmington Parking Authority, supra*—a 33 year-old decision that was expressly limited to a narrow set of facts not present here—requires a finding that the federal government is a "joint participant" in Amtrak's sale of advertising space. But that argument is entirely without merit.

In *Burton*, this Court found state action in the exclusion of black citizens from a restaurant that leased space in a building that was built, owned and maintained by the State, and used primarily to house a public parking garage. 365 U.S. at 723-25. Noting that "no state may effectively abdicate its responsibilit[y]" to avoid the "grave injustice" of excluding black citizens from a "public building," *id.* at 724-25, the Court reasoned: "By its inaction, the [Parking] Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination," *id.* at 725. And emphasizing that the "profits earned by discrimination [in

[10] Petitioner suggests that the federal government had involvement in these decisions through the actions of Amtrak's board. But there is no evidence that Amtrak's board had any involvement in the formulation of Amtrak's policy against political advertising on the Spectacular, or in Amtrak's rejection of petitioner's political ad. Petitioner's argument that it did is without the slightest support in the record. Moreover, only one of Amtrak's board members, the Secretary of Transportation, is a federal official. Although five of the nine board members are appointed by the President, they are selected from a list submitted by commuter authorities or connected with the railroad industry. *See* p. 3, *supra*. This Court has held that the similarly structured "Conrail is not a federal instrumentality by reason of the federal representation on its board of directors," reasoning that "[t]he responsibilities of the federal directors are not different from those of the other directors —to operate Conrail at a profit for the benefit of its shareholders." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 152 (1974).

the restaurant] not only contribute to, but also are indispensable elements in, the financial success of [the] governmental agency" that owned the building and operated the parking garage, *id.* at 724, the Court concluded: "The State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity," *id.* at 725.

This Court in *Burton* was careful to "[s]pecifically defin[e] the limits" of its holding: "what we hold today is that when a State *leases* public property *in the manner* and *for the purpose* shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself." *Id.* at 726 (emphasis added). Obviously that holding has no applicability here.

Petitioner argues that the holding in *Burton* should be extended to cover this case—in effect, that *Burton* should be construed to mandate a finding of governmental action whenever the government and a private actor are in a position of "interdependence," or when a "symbiotlic relationship" can be said to exist between the government and a private actor. But that argument not only lacks support in the decisions of the courts of appeals, it also ignores the cases in which this Court has repeated declined to extend the holding in *Burton* to a variety of relationships between government and private entities involving a much greater degree of "interdependence" than is present here. For example, in *Blum v. Yaretsky, supra,* this Court declined to extend *Burton* to the actions of nursing homes in transferring state Medicaid patients to different, less expensive facilities, despite extensive evidence of interdependence: (1) the nursing homes were dependent on the State for subsidization of their operating and capital costs and for payment of the medical expenses of more than 90 percent of their patients, 457 U.S. at 1011; (2) the State was dependent upon the

nursing homes to care for its Medicaid patients and to carry out its Medicaid program; (3) the State benefitted financially and directly from the transfers at issue—and, in fact, encouraged such transfers, when appropriate, precisely to save money, *id.* at 1007-08, 1009-10; *see Rendell-Baker v. Kohn,* 457 U.S. 830, 841 (1982); and (4) the nursing homes were "extensively regulated" by the State, 457 U.S. at 1004. Notwithstanding these facts showing what was literally a symbiotic relationship, this Court rejected the plaintiff's "rather vague generalization," supported by citation to *Burton,* "that such a relationship exists between the State and the nursing homes it regulates that the State may be considered a joint participant in the homes' discharge and transfer of Medicaid patients." 457 U.S. at 1010-11.

Similarly, in *Rendell-Baker v. Kohn, supra,* this Court refused to extend *Burton* to the actions of a private school that contracted with the State to provide special education to public school students, again despite substantial evidence of interdependence between the school and the State: (1) the school depended on the State each year for at last 90 percent, and in one year 99 percent, of its operating budget, 457 U.S. at 832; (2) "nearly all of the students at the school [were] referred" by the State, *id.*; (3) the State depended on the school to "provide[] a service that the State [was] required to provide" under state law, *id.* at 849 (Marshall, J., dissenting); and (4) the school was extensively regulated, *id.* at 841. Those facts, the Court concluded, did not render the school a governmental actor for constitutional purposes.

Finally, in *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., supra,* this Court strongly indicated that interdependence does not itself support a finding of governmental action absent evidence that the government exercised "coercive power" or provided "significant encouragement" with respect to the challenged decision. In that case, the Court rejected petitioner's argument that the United States Olympic Committee (the

"USOC")—which like Amtrak is a private corporation established pursuant to an Act of Congress—was a governmental actor under the analysis of *Burton*. 483 U.S. at 542-47. Petitioner, and Justice Brennan in dissent, asserted that the USOC was a federal actor because Congress (1) granted the USOC its corporate charter, (2) "gave the USOC authority and responsibility that no private organization in this country had ever held," 483 U.S. at 557 (Brennan, J., dissenting), and (3) "conferred substantial financial resources on the USOC, authorizing it to seek up to $16 million annually in grants from the Secretary of Commerce, and affording it unprecedented use of the word 'Olympic' and related emblems to raise additional funds," *id.* (Brennan, J., dissenting) (citations omitted).[11] Notwithstanding the evidence of a symbiotic relationship, the Court held that the USOC was a private actor, because the petitioner had "failed to demonstrate that the Federal Government can or does exert any influence over the exercise of the USOC's enforcement decisions." *Id.* at 547 n.29. The Court held that "[*a*]*bsent proof of this type of 'close nexus between the* [*Government*] *and the challenged action of the* [*USOC*],' the challenged action may not be 'fairly treated as that of the [Government] itself." *Id.* (emphasis added; citation omitted). As already demonstrated, there is no such nexus between the federal government and Amtrak's decision to reject petitioner's "advertorial."

In short, neither this Court's holding in *Burton* nor its subsequent decisions lend any support to petitioner's argument that Amtrak is a governmental actor. To the contrary, the Court's more recent decisions reinforce the

[11] The federal government also received substantial benefits from the relationship. In exchange for providing the USOC with funding and "traditional governmental powers," the USOC "serve[s] [the] national interest" by "correct[ing] the disorganization and serious factional disputes that seemed to plague amateur sports" and by "represent[ing] th[e] Nation to the world community." 483 U.S. at 544-51.

correctness of the unanimous decisions of numerous courts that Amtrak is not a governmental actor for constitutional purposes.

CONCLUSION

The court of appeals' decision does not conflict with any decision of this Court or of any court of appeals. Instead, the court of appeals simply found what every other court has found when presented with the same issue: the federal government is not sufficiently intertwined with Amtrak's day-to-day affairs that Amtrak's decisions must be deemed to be those of the government. The Petition for a Writ of Certiorari should be denied.

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APPENDIX

APPENDIX

After a hard week's work, you're ready for the right place with the right one. Why make the right moment the right's moment? Coors Light not only has the taste that won't slow you down. It's the Silver Bullet that aims the Far Right's political agenda at the heart of America. Want the awesome facts? Then read between these lines.

Every year, the Coors family, owners of Coors Brewing Co., gives financial support to groups like The National Forum Foundation, Morality in Media, The Heritage Foundation and The Free Congress Foundation. They form part of a network that includes authoritarian religious and political extremists. When you buy Coors products, you help them turn back civil rights, censure [sic] high school textbooks, weaken labor laws and environmental protections, promote homophobia, and meddle in foreign affairs. Did you know Joe Coors himself bought an aircraft for the Nicaraguan contras?

Where are the Nicaraguan contras today? El Loco says "Once, we were glad to have Joe Coors and his friends on our side. Together, we fought the hard and dirty fight that drove Nicaraguans to the voting booth to make The Right's Choice for a Better Nicaragua! Now the shooting war is over; after 30,000 dead, I can walk into my favorite Managua bar and say, 'No more of that industrial strength Nicaraguan cervesa for me. Gimme the great taste of Coors Light!' But my family, and Nicaraguan families everywhere, are poorer than ever. With 55% unemployed, we scour garbage heaps for food in the villages we ravaged. What happened to all that promised U.S. aid? What does it really mean to say that Coors Light is The Right's Beer now?"

E 2210-18 (footnotes omitted).